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HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 85

ANDRIJA ARTUKOVIC,

Petitioner,

v.

RATO IVANCEVIC, Consul General of the Federal People's Republic of Yugoslavia.

ANDRIJA ARTUKOVIC,

Petitioner,

v.

JAMES J. BOYLE, United States Marshal.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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JAMES J. BOYLE, UNITED STATES MARSHAL

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

The question presented to the Court of Appeals for the 9th Circuit was whether there is an extradition treaty now in effect between the United States and the Federal People's Republic of Yugoslavia. In a long and carefully considered opinion, that Court (Stephens, J.) answered this question in the affirmative, holding that "the extradition treaty executed by and between the United States and Serbia in 1902 is a present, valid and effective treaty be-

tween the United States and the Federal Peoples' Republic of Yugoslavia, and has been a valid and effective treaty continuously since its execution between the United States and Serbia and through the changes in official title of the latter state to its present title of Federal Peoples' Republic of Yugoslavia."[1] (R. 428, 429; 211 F. 2d 565, 575).

Petitioner concedes (P. 7; R. 407) the identity of the Federal People's Republic of Yugoslavia with the Kingdom of Yugoslavia and the Kingdom of the Serbs, Croats and Slovenes as one and the same state for all international purposes.[2] He attacks (P. 6, 15, 16) the holding of the Court below, however, on the ground that the voluntary union with the Kingdom of Serbia in 1918/19 of Montenegro and certain provinces of the former Austro-Hungarian Empire, which emerged as the Kingdom of the Serbs, Croats and Slovenes, resulted in the extinguishment of Serbia's identity, and with it, of all of Serbia's treaty rights and obligations. He contends (P. 6, 14) that the Kingdom of the Serbs, Croats and Slovenes was a "new" state, and that as such it could not and did not succeed to the international rights and obligations of Serbia, with which the Treaty here in question had been concluded by the United States.

Petitioner's contention that the Kingdom of the Serbs, Croats and Slovenes was such a "new" state rests

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[1] The treaty referred to was signed at Belgrade on October 25, 1901; ratifications were exchanged on May 13, 1902; it was proclaimed on May 17, 1902; and it became effective June 12, 1902. R. 68-70; II Malloy, *Treaties*, 1622; 32 STAT. (pt. 2) 1890; Treaty Series 406. It is referred to variously as the Extradition Treaty of 1901 and the Extradition Treaty of 1902.

[2] For convenience sake, the words Yugoslav and Yugoslavia are used herein indiscriminately to refer to the Kingdom of the Serbs, Croats and Slovenes, the Kingdom of Yugoslavia and the Federal People's Republic of Yugoslavia. This is and has been the popular name for the country regardless of changes in the formal name of its government, which are irrelevant to the discussion herein. Cf., *e.g.*, II *Foreign Relations of the United States, 1921*, 945, n. 1.

solely on the syllogism (P. 14-17) that only "new" states are recognized, the Kingdom sought and received United States recognition in 1919, *ergo,* it was a "new" state, and, perforce, did not succeed to Serbia's treaty rights and obligations. On the ground that the inescapable "legal effect" of such recognition was "the termination of the Serbian treaties" petitioner (P. 6, 18) in effect characterizes as being without significance or consequence the circumstance that when the question of the applicability of such treaties throughout Yugoslavia was first formally raised, the late Chief Justice Hughes, then Secretary of State, held in a formal communication dated June 4, 1921, that they were applicable throughout the Kingdom of the Serbs, Croats and Slovenes, and, by necessary implication, that they were in full force and effect between the United States and Yugoslavia (R. 415-418; V Hackworth, *Digest of International Law* 375). Indeed, this has been the view consistently taken by the political authorities of both the American and Yugoslav Governments on every known occasion, including this, on which the continuation in force and effect of the Serbian treaties, including the Extradition Treaty (32 STAT. [pt. 2] 1890) here involved, was relevant. See Point II, *infra.* Under similar circumstances involving the question of the continued validity, after the formation of the German Empire in 1870, of the Extradition Treaty of 1852 with Prussia, this Court said in *Terlinden* v. *Ames,* 184 U. S. 270, 286 (1902):

> Thus it appears that the German Government has officially recognized, and continues to recognize, the treaty of * * * 1852, as still in force * * *.
>
> It is out of the question that a citizen of one of the German states, charged with being a fugitive from its justice, should be permitted to call on the courts of this country to adjudicate the correctness of the conclusions of the Empire * * * especially as the executive de-

partment of our government has accepted these conclusions * * *.

Petitioner's position is that both governments are and have been wrong, and that the United States need not now respect any treaty rights granted by it to Serbia. But the coin has an obverse: the treaties granted rights not only to Serbia but to the United States, as well. Obviously, if the union with Serbia of the other territories extinguished the rights so granted by the United States, by the same token the rights so granted to the United States have also been extinguished. That this is not an academic matter is witnessed by the importance which the United States Government attached to such rights, when, in 1946 as a condition of recognizing the republican government which had replaced the monarchy in Yugoslavia, the United States requested and received the new government's assurances that it recognized the continuing validity as between the United States and Yugoslavia of the latter's international obligations (R. 75-78; XIII Dept. of State *Bulletin* 1020, XIV *id.*, 728) which must, of necessity, have included those contained in the treaties concluded between the United States and Serbia which both countries had long understood to have survived the organization of the Yugoslav union (V Hackworth, *Digest of International Law* 374, 375; See Point II, *infra*).

Summary of Argument

Under the rule enunciated in *Terlinden* v. *Ames*, 184 U. S. 270 (1902) whether a treaty survives or is terminated as the consequence of political events affecting the other party to it is a political question to be determined by the executive branch. A long series of unequivocal and consistent acts and pronouncements of the executive branch

conclusively evidences its express determination that the union, after World War I, of certain territories with Serbia did not terminate the treaties previously concluded between the United States and Serbia, but that such treaties survived and now are, and have continuously been in full force and effect between the United States and Yugoslavia, as the union is titled. Moreover, the determination of the political branch is in accord with the applicable principle of international law that, as in the case of the unification of Italy, the treaties of a state to which territory is annexed or *with* which territory is united, survive the annexation or union and continue to be in full force and effect. That the United States "recognized" Yugoslavia did not imply that Serbia's treaties were terminated. The Treaty of Saint Germain-en-Laye recognized the continuance in force and effect of Serbia's treaties.

Argument

I

WHETHER AN OTHERWISE VALID AND SUBSISTING TREATY IS EXTINGUISHED AS A CONSEQUENCE OF POLITICAL EVENTS AFFECTING THE OTHER PARTY TO IT IS A POLITICAL QUESTION TO BE DETERMINED BY THE EXECUTIVE BRANCH. THE EXECUTIVE BRANCH HAS DETERMINED THAT THE TREATIES BETWEEN THE UNITED STATES AND SERBIA, INCLUDING THE EXTRADITION TREATY OF 1902, SURVIVED THE UNION WITH SERBIA OF MONTENEGRO AND FORMER AUSTRO-HUNGARIAN PROVINCES, AND CONTINUE TO BE IN FULL FORCE AND EFFECT BETWEEN THE UNITED STATES AND YUGOSLAVIA. SUCH DETERMINATION IS IN ACCORD WITH APPLICABLE PRINCIPLES OF INTERNATIONAL LAW.

A. *The Principle of Political Decision*

The question here, as in *Terlinden* v. *Ames*, 184 U. S. 270 (1902) is whether a treaty was terminated by political

events affecting the other party to it—there the union of Prussia and other German states to form the German Empire, here the union with Serbia of Montenegro and former Austro-Hungarian provinces out of which Yugoslavia emerged. Petitioner concedes (P. 12) as he must, that such a question is by its very nature political, and to be determined by the executive branch. *Clark* v. *Allen,* 331 U. S. 503 (1947); Cf. *Doe* v. *Braden,* 16 How. 635, 657 (1853). For what is involved is whether, notwithstanding the events affecting it, power remains in the foreign state to perform its obligations under the treaty. *Clark* v. *Allen, supra,* 331 U. S. at 514; *Harvard Research in International Law* (1935) 29 Am. J. Int. Law, Supp. Pt. III, Law of Treaties, 1075. Thus, to complete petitioner's partial quotation (P. 20, 21) Mr. Chief Justice Fuller, speaking for a unanimous Court, said in *Terlinden* v. *Ames, supra* (184 U. S. at 285):

> * * * we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance. * * *

And again (184 U. S. at 288):

> We concur in the view that the question whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard.

And finally (184 U. S. at 289):

> * * * it cannot be successfully contended that the courts could properly intervene on the ground that the treaty under which both governments had proceeded had terminated by reason of the adoption of the Constitution of the German Empire, notwithstanding the judgment of both governments to the contrary.

As in *Terlinden* v. *Ames, supra,* the question here involved is not "whether extinguished treaties can be renewed by tacit consent under our Constitution" (P. 19, 20), but rather whether the courts may review a political decision of the executive branch that a treaty has not been terminated, but continues to be in full force and effect, notwithstanding political events affecting the foreign state which is the other party to it. In *Terlinden* v. *Ames, supra,* this Court answered that question unmistakably in the negative. But while conceding the principle, petitioner would nevertheless have the Courts disregard as nugatory the deliberate and unmistakably clear decision of the executive branch that the treaties with Serbia have survived and are in force and effect. Quite contrary to what petitioner would imply (P. 11, 12), the determination of the executive branch is evidenced by a long and continuous series of consistent and unambiguous pronouncements and acts, including a certificate of the Secretary of State prepared in connection with these proceedings (Ex. DG-E, R. 303-4, 362; see Point II, *infra*).

B. *The Applicable Principles of International Law*

The decision of the executive branch that the Serbian treaties survived the union out of which Yugoslavia emerged is in accord with the principles of international law applicable under the circumstances surrounding the union, for which reference is made to the opinion of the Court below, R. 408-425; 211 F. 2d 566-573. Thus, in 2 Hyde, *International Law* (1945) 1535, it is said:

> It was logical and natural that the Government of the Kingdom of the Serbs, Croats and Slovenes, should have acknowledged to that of the United States in 1921, that it considered the treaties and conventions concluded between the Kingdom of Serbia and the United

> States as applicable to the whole territory of the Kingdom of the Serbs, Croats and Slovenes, as then constituted. * * * The latter Kingdom embodied, in a territorial sense, the enlargement of the former Kingdom, and was the same State with a bigger body. It was also reasonable to contend, as did the United States in substance in 1921, that that Kingdom should regard those agreements as applicable to its territory which had formerly belonged to the Austro-Hungarian Empire. * * *

The British authorities are in accord. Thus, in McNair, *The Law of Treaties* (1938) 443, it is said:

> *Serb-Croat-Slovene State.* In the view of the United Kingdom Government this State has succeeded to the treaty obligations of Serbia, except in so far as it has been specifically released from them. * * *
>
> * * * * * * *
>
> There seems to be no doubt that this case must be regarded as an enlargement of the territory of an existing State.

Petitioner's quotation from Professor Hyde's work (P. 16) is out of context and without pertinence. There, what was being considered was not the continuing validity of treaties after a union, but the circumstances under which union results in the loss by states of "the privilege of dealing with the outside world, or of being held out to it as distinctive entities in whose behalf as such foreign relations are conducted * * *." 1 Hyde, *International Law* (1945) 126. There is no contention that Serbia may conduct foreign relations separate and apart from Yugoslavia. Cf. Baty, *International Law* (1909) 317-324.

The principle of international law on which the conclusions of Professors Hyde and McNair rest is well illustrated by the case of Italy, whose unification in many ways pre-

sents striking similarities to that of Yugoslavia. Between 1859 and 1861 Lombardy, Tuscany, Emilia, Parma, and the Kingdom of the Two Sicilies united with the Kingdom of Sardinia to form the Kingdom of Italy. The Italian Government took the position that Sardinia had maintained its juridical entity, and that Sardinia's treaties had survived the union and were applicable throughout the territory of the Kingdom of Italy. The theory supporting this position was that the Kingdom of Italy did not constitute a new state, but that, instead, an existing state, Sardinia, serving as a nucleus, had expanded into a larger state into which the other states had been absorbed. It is true that there was considerable controversy among jurists at the time; but in *Harvard Research in International Law*, (1935) 29 Am. J. Int. Law, Supp. Pt. III, Law of Treaties, 1073, it is pointed out that:

> The controversy, however, has only an academic interest. The courts of both Italy and France held that the treaty of March 4, 1760, concluded between France and Sardinia, relative to the execution of judgments, survived the formation of the Kingdom of Italy and was applicable throughout the Kingdom of Italy and binding on both countries—this on the theory that the Italian Kingdom was merely an expansion or enlargement of the State of Sardinia. * * * For the French decisions, see, among others, the cases of *La Moderazione* c. *La. Chambre d'Assurances* (Court of Paris, 1879), *Mantil* c. *Pompilis* (Tribunal Cor. of the Seine, 1883, 10 *Journal du Droit International Privé*, 1883, p. 500), and *Vincent* c. *Bardini*, *Dalloz*, 1901, 2.257 and the note thereon by Pic. See also the decision of the Court of Montpellier of July 10, 1872, in the case of *Iconomidis* v. *Coude* (6 *Journal du Droit International Privé*, 1879, p. 69), where it was emphasized that additions to the territory of a State have no effect upon the State's treaty obligations. * * * For the Italian

jurisprudence, see, among others, the decision of the Italian Court of Cassation of December 3, 1927, in the case of *Gastaldi* v. *Lepage Hemery* (9 *Rivista di Diritto Internazionale,* 3d ser. 1930, p. 102), where the survival of the treaty of 1760 between France and Sardinia was affirmed, on the principle that the Italian State was merely an expansion of the Kingdom of Sardinia. See also the decisions of various Italian Courts cited or summarized in 5 *Journal du Droit International Privé* (1878), p. 244, and 6 *ibid.* (1879), p. 305 ff.

It may be added that the Permanent Court of International Justice in the *Case of the Free Zones of Upper Savoy and the District of Gex,* recognized that the treaty of Turin of March 16, 1816, between Sardinia and Switzerland survived the transformations which resulted in the formation of the Italian Kingdom. *Publications of the P.C.I.J.,* Series A, No. 22, p. 18, and Series A, No. 24, p. 17.

The conclusion deducible from the practice in the case of the formation of the Italian Kingdom is that when a State enlarges its territorial domain by the annexation of other States, its treaties continue to bind it.

That Yugoslavia's unification was effected peacefully and voluntarily and without the elements of war and conquest that accompanied the unification of Italy is of no moment. The significant fact, in the case of Italy, is that the uniting states united *with* Sardinia, and, in the case of Yugoslavia, that the uniting territories united *with* Serbia. That the union was *with Serbia* has been the view of the United States from the very outset. Thus, in a public statement on February 7, 1919, the Secretary of State announced that "the United States * * * welcomes the union" and said (R. 89; P. 10; II *Foreign Relations of the United States,* 1919, 899; 1 Hackworth, *Digest of International Law* 221):

> * * * After having achieved their freedom from foreign oppression the Jugo Slav[s] formerly under Austro-Hungarian rule on various occasions expressed the desire to *unite with the Kingdom of Servia.* The Servian Government on its part has publicly and officially *accepted* the union of the Serb, Croat and Slovene peoples. * * * (Emphasis supplied).

Again, on February 10, 1919, in a note formally extending recognition to the Yugoslav Government, the Department of State said in pertinent part (R. 89-90; I Hackworth, *Digest of International Law* 221; II *Foreign Relations of the United States, 1919,* 899-900):

> * * * the Government of the United States welcomes the union of the Serbian, Croatian and Slovene provinces within the boundaries of the former Austro-Hungarian Monarchy *to Serbia* * * *. (Emphasis supplied).

The latter was in response to a note from the Serbian Charge d'Affaires received on January 6, 1919, (R. 84-85; II *Foreign Relations of the United States, 1919,* 892-3; I Hackworth, *Digest of International Law* 220) in which it was said that the Serbian, Croatian and Slovene provinces of the former Austro-Hungarian Empire had proclaimed their "Union * * * into one single state *with* the Kingdom of Serbia" and that by virtue of decisions of the Great National Assembly of the Kingdom of Montenegro, that Kingdom, "*united to* Serbia * * *, is included in the Kingdom of the Serbs, Croats and Slovenes." Similarly, in the preamble to the Treaty of Saint Germain-en-Laye of September 10, 1919, it was recognized that "the Serb, Croat and Slovene peoples * * * have of their own free will determined to unite *with* Serbia, and * * * the Serbian Government have *agreed* to this union * * *." III Malloy (Redmond) *Treaties* 3731.

Petitioner, however, argues (P. 16, 17) that as a consequence of the union, Serbia was "absorbed" into Yugoslavia, and thereupon became extinct as an independent state, with the inevitable result, *as a matter of law,* that treaties to which Serbia was a party were terminated. But such a grotesque concept has no validity under international law and none of the authorities cited by petitioner support it. They are all addressed to the situation created by the absorption of one state into the territory of another *existing* state which has its own international personality and its own already subsisting network of international rights and obligations. This is accomplished when, as in the cases of the Texan and Hawaiian annexations to the United States, for example, one sovereign power is absorbed into another *existing* power and its international identity is merged in the latter's. Thus, on June 25, 1897, Secretary of State Sherman advised the Japanese Government in connection with the Hawaiian annexation in pertinent part as follows (2 Hyde, *International Law* [1945] 1531):

> The history of Europe, of America, of the whole world is full of examples from remote periods to our own days, where independent States have ceased to be such through constrained or voluntary absorption by another, with attendant extinction of their former treaties with other States. It needs no stipulation in a formal annexation treaty to work this result, for it attends *de facto* annexation however accomplished. The forcible incorporation of Hanover into the Prussian Kingdom instantly destroyed previous Hanoverian treaties. The admission of Texas to Statehood in our Union by joint resolution extinguished the treaties of the independent Republic of Texas. The recent French law declaring Madagascar to be a colony of France ended the former treaties of that kingdom. It is the fact, not the manner of absorption, that determines treaties. * * *

See also *Report by the Law Officers of the Crown, July 16, 1857,* McNair, *The Law of Treaties* (1938) 393-4.

It is merely an exercise in semantics to talk about the absorption of Serbia into Yugoslavia in the same context. Yugoslavia was non-existent until the union *with* Serbia of the former Austro-Hungarian provinces and Montenegro. Until that moment, Yugoslavia was without form or substance and it had neither sovereignty nor territory. Yugoslavia "absorbed" Serbia, as in the case of Italy and Sardinia, only in the sense that *it came into being as its successor,* endowed with the rights and encumbered with the obligations of the sovereign which it had succeeded, and from which its own sovereignty was derived.

While conceding (P. 12) the rule of political decision as enunciated in *Terlinden* v. *Ames* and *Doe* v. *Braden, supra,* petitioner argues (P. 6, 12-17) that the "recognition" by the United States of Yugoslavia on February 7, 1919, was as a *matter of law* a "decision" that Yugoslavia was a "new" state, with the inescapable and immediate result, as a *matter of law,* that all Serbian treaties were terminated. The major premise on which this argument is based is (P. 13, 14) that recognition is accorded only to "new" states. The minor premise on which it is based is that a "new" state may not at the same time be a "successor" state, i. e., a state succeeding to the rights and obligations of another state. Let us examine these premises.

The major premise is patently fallacious. Thus, in I Hackworth, *Digest of International Law,* 161, it is said:

> Recognition may be of new states, *of new governments* or of belligerency. It is evidenced, in the case of a *new state or government,* by an act officially acknowledging the existence of such *state or government* and indicating a readiness on the part of the recognizing

> state to enter into formal relations with it. (Emphasis supplied).

Similarly, in I Oppenheim, *International Law* (1947) 125-126, it is said:

> Recognition of a new State must not be confused with recognition of a new * * * Government of an old State. Recognition of a change * * * in the form of * * * Government, or of a change in the title of an old State, are matters of importance. But the granting or refusing of these recognitions has nothing to do with recognition of the State itself. If a foreign State refuses to recognize * * * a change in the form of the Government of an old State, the latter does not thereby lose its recognition as an International Person, although no official intercourse is henceforth possible between the two States as long as recognition is not given either expressly or tacitly. If recognition of a new title of an old State is refused, the only consequence is that such State cannot claim any privileges connected with the new title.

See also 1 Hyde, *International Law* (1945) 158 *et seq.*

Accordingly, the mere fact of recognition is not, as petitioner contends, conclusive that it is a new *state* that is being recognized. In this connection, it is noteworthy that the State Department, in the communication of April 17, 1924, relied on by petitioner (P. 14, 15), stated that the United States had recognized "*the government* of the Kingdom of the Serbs, Croats and Slovenes on February 7, 1919." Furthermore, both in the public statement of the Secretary of State on February 7, 1919, referred to in such communication, and in the formal note of February 10, 1919 (R. 89-90; I Hackworth, *Digest of International Law,* 221; II *Foreign Relations of the United States, 1919,* 899-900) the United States recognized the continuity of Serbia and Yugoslavia. In the former it was said, in welcoming the

union that was Yugoslavia, that what had transpired was that Yugoslavs formerly under Austro-Hungarian rule had "expressed the desire to unite *with* the Kingdom of Serbia" and the "Serbian Government * * * has publicly and officially *accepted* the union * * *." In the latter, it was said, in pertinent part:

> I have the honor to acknowledge the receipt of an undated Note from the *Serbian* Charge d'Affaires stating that in accordance with a decision of the Central Committee * * * representing the * * * Serbian, Croatian and Slovene provinces within * * * the former Austro-Hungarian Monarchy, the *Serbian* Crown Prince has proclaimed the union of [such] * * * provinces *with* the Kingdom of Serbia in a single state all *under the title of* "Kingdom of the Serbs, Croats and Slovenes" * * *.
>
> * * * * * * *
>
> * * * the Government of the United States welcomes the union of the * * * provinces *to* Serbia and *recognizes the Serbian Legation as the Legation of the Kingdom of the Serbs, Croatians and Slovenes.* (Emphasis supplied).

Thus, the recognition of Yugoslavia by the United States consisted of its *welcoming* of the union *with the Kingdom of Serbia* of the former Austro-Hungarian provinces, and of its acknowledgment that thereafter the title of the Kingdom would be the Kingdom of the Serbs, Croats and Slovenes.

The minor premise of petitioner's argument is equally fallacious, for there is nothing inconsistent in a state being both a "new" state, that is, a new sovereignty, and at the same time the successor to the international rights and obligations of an older sovereignty. Such succession occurs when territory passes from one state to another and "rights

of sovereignty are already in existence prior to the change, * * * [lodged] in a State, or a political community regarded as capable of exercising them, and whose title thereto is respected." 1 Hyde, *International Law* (1945) 394-5. When the former Austro-Hungarian provinces and Montenegro united *with* Serbia to form Yugoslavia, Serbia was already a sovereign state whose right to sovereignty and capability to exercise it were universally recognized. Accordingly, the signatories to the Treaty of Saint Germain-en-Laye of September 10, 1919 (III Malloy [Redmond] *Treaties,* 3731-2) recognized the survival of Serbia's treaties and that Yugoslavia was the successor to Serbia, insofar as concerns international rights and obligations. Thus, in its preamble, this treaty, after reciting that

> * * * the Serb, Croat and Slovene peoples of the former Austro-Hungarian Monarchy have of their own free will determined to unite with Serbia in a permanent union for the purpose of forming a single sovereign independent State under the title of the Kingdom of the Serbs, Croats and Slovenes * * *;

that

> * * * the Prince Regent of Serbia and the Serbian Government have agreed to this union * * *;

and that

> * * * in consequence the Kingdom of the Serbs, Croats and Slovenes has been constituted * * *;

recites that one of the purposes of the treaty was

> *to free Serbia from certain obligations which she undertook by the Treaty of Berlin of 1878* to certain powers and to substitute for them obligations to the League of Nations * * *. (Emphasis supplied).

Obviously, there would have been no occasion for any such purpose if the union had resulted in the extinguishment of Serbia's treaty rights and obligations, and if Yugoslavia were not Serbia's successor thereto.

Petitioner misplaces reliance on Article 12 of the Treaty of Saint Germain-en-Laye. (P. 11, 17) He assumes that Article 12 was intended to create or re-create treaty rights and obligations, whereas its clear purpose was merely to recognize their continuing existence. This is not only apparent from the purpose of the Treaty to release Serbia from obligations under the Treaty of Berlin, which on petitioner's thesis would have been unnecessary, but also from the language employed—that the Serbian treaties "shall *ipso facto* be binding on the Serb-Croat-Slovene State." The very words *ipso facto* necessarily import that Article 12 means not that Yugoslavia shall assume the obligations of the Serbian treaties, but rather that the Serbian treaties shall be binding on Yugoslavia, *as the result of the mere fact* that they were binding on Serbia, in other words, *by the very nature of the case.* See Webster, *New International Dictionary* (2d Ed.). In no sense could the signing of this treaty by representatives of this government, be construed as a decision recognizing the termination of Serbian treaties. It was the exact reverse. It was a recognition that *ipso facto* they continued.

In commenting on Article 12, it is said in *Harvard Research in International Law,* (1935) 29 Am. J. Int. Law, Supp. Pt. III, Law of Treaties, 1075:

> This article appears to have been based on the view that the Yugoslav Kingdom was not a new State but an expansion of the Kingdom of Serbia. Serbia was admittedly the nucleus of the Yugoslav Kingdom, she had concluded treaties with foreign States which were in force at the time of the formation of the Yugoslav

> Kingdom, and it could hardly be maintained that her union with the other territories destroyed her capacity to perform the treaty obligations which she had assumed prior to the territorial and political transformations which she underwent.

As the Court below so aptly put it, while there "is no exact formula by which it can be determined that a change * * * amounts to a continuance of the old or the beginning of a new nation * * *" (R. 426), here, that is immaterial, for (R. 424):

> * * * the combination of countries into the Kingdom of the Serbs, Croats and Slovenes, and then by internal political action into "Federal Peoples' Republic of Yugoslavia" was formed by a movement of the Slav people to govern themselves in one sovereign nation, with Serbia as the central or nucleus nation. Great changes in the going government were in the planning, and were brought about, but the combination was not an entirely new sovereignty without parentage. But even if it is appropriate to designate the combination as a new country, the fact that it started to function under the Serbian constitution as the home government and under Serbian legations and consular service in foreign countries, and has continued to act under Serbian treaties of Commerce and Navigation and the Consular treaty, is conclusive proof that if the combination constituted a new country it was the successor of Serbia in its international rights and obligations.

Petitioner's argument (P. 17) based upon the absence from the Treaty of Paris of December 9, 1919, with Rumania of any provision similar to Article 12 of the Saint Germain-en-Laye Treaty, must also fail. The irrelevance of this difference between the two treaties is at once apparent when their purposes are compared. The purpose of the Treaty of Paris, between the Principal Allied and Associated Powers and Rumania, as given in its preamble, III Malloy (Redmond) *Treaties* 3724, was—

> * * * to give full guarantees of liberty and justice to all inhabitants of the old Kingdom of Roumania and of the territory added thereto [under Treaties to which the Principal Allied and Associated Powers are parties], to whatever race, language or religion they may belong.

Rumania's existing treaty rights and obligations were not involved, and there was no occasion to mention them. On the other hand, as we have seen, one of the purposes of the Treaty of Saint Germain-en-Laye was "to free Serbia from certain obligations she undertook by the Treaty of Berlin of 1878." Clearly, there was occasion when the continuing validity of one of Serbia's treaties was being expressly recognized, to refer to Serbia's treaties generally, for the principle *expressio unius, exclusio alterius* applies to treaties as to other formal documents. Furthermore, the union with Serbia of the former Austro-Hungarian provinces was more complex than the annexations to Rumania, and it may well be that caution indicated that Yugoslavia's rights and obligations under the Serbian treaties should be expressly recognized. Thus, while Ellsworth argued against the provision which is now the first sentence of Article VI of the Constitution of the United States, on the ground that it was "unnecessary" in that the United States was and would continue to be bound by engagements entered into under the Articles of Confederation, Randolph, Madison and Gerry prevailed in their view that its inclusion was proper in order to prevent "misconstruction" and to avoid "pretexts." II Farrand, *Records of the Federal Convention* (1911) 377.

Thus, it would appear to be clear that the determination of the executive branch was in accord with accepted principles of law and that neither the Treaty of Saint Germain-en-Laye nor the recognition of Yugoslavia implied that the Serbian treaties were terminated.

II

THE DECISION OF THE EXECUTIVE BRANCH THAT THE TREATIES WITH SERBIA SURVIVED THE UNION AND HAVE CONTINUOUSLY BEEN, AND NOW ARE IN FORCE AND EFFECT BETWEEN THE UNITED STATES AND YUGOSLAVIA IS CONCLUSIVELY EVIDENCED BY A LONG SERIES OF CONSISTENT AND UNAMBIGUOUS ACTS AND PRONOUNCEMENTS.

In all, the United States concluded three treaties with Serbia prior to the union from which Yugoslavia emerged. These are: the *Extradition Treaty* of 1902 (32 STAT. [pt. 2] 1890; Treaty Series 406; II Malloy, *Treaties* 1622) which is here involved, the *Consular Convention* of 1881 (22 STAT. 968; Treaty Series 320; II Malloy, *Treaties* 1618) and the *Treaty of Commerce and Navigation* of 1881 (22 STAT. 963; Treaty Series 319; II Malloy, *Treaties* 1613). None of such treaties is by its terms for a fixed period, and the status of each after the union from which Yugoslavia emerged necessarily stands upon the same footing, as the Court below correctly recognized (R. 422-3; 211 F. 2d 572). The determination of the executive branch and of Yugoslavia that such treaties survived the union is evidenced by the following:

(1) In a note received January 6, 1919, the Serbian Charge d'Affaires advised the Acting Secretary of State that henceforth the "Legations, *Consulates* and other Missions of the Kingdom of Serbia" would be "the Legations, *Consulates* and other Missions of the Kingdom of the Serbs, Croats and Slovenes", *i.e.*, of Yugoslavia (R. 84, 85; II *Foreign Relations of the United States, 1919,* 892-3). The United States apparently acquiesced in this, for consular officers of the United States and Yugoslavia have continuously been permitted to carry on their official work in the territory of the other. See, *e.g.*, II *Foreign Relations of the United States, 1921,* 949-953; *Foreign Service List Cor-*

rected to September 1, 1920, Government Printing Office (1920) p. 35; *Foreign Service List, April 1, 1953,* Dept. of State Pub. 4998, pp. 87, 144; *Register of the Department of State, May 1, 1922,* Government Printing Office (1923) pp. 283-4; *Foreign Consular Offices in the United States, April 1, 1952,* Dept. of State Pub. 4573, p. 52. This mutual exchange of consular officers, dependent of course on assurances of reciprocal treatment, must rest on the continuing validity of the Consular Convention of 1881, as no other agreement on the subject was or has been entered into between the United States and Yugoslavia. See *Urbus* v. *State Compensation Commission,* 113 W. Va. 563, 169 S. E. 164 (1933); *Olijan* v. *Lublin,* 50 N. E. 2d 264 (Ohio 1943).

(2) On May 31, 1921, F. K. Nielsen, Solicitor of the Department of State, rendered an opinion (P. 17, 18) that treaties between the United States and Serbia were applicable to the whole of Yugoslavia and added that the "government of that country has, I think, already indicated that it considers the old Serbian treaties applicable to the present Kingdom." This was followed by the June 4, 1921 statement of Secretary of State Hughes, adverted to above, that the Serbian treaties "may properly be regarded as applicable" to the territories of the former Austro-Hungarian provinces which had united with Serbia in the Yugoslav union (R. 91-92, 415-18; V Hackworth, *Digest of International Law* 375). It is noteworthy that neither Secretary Hughes nor Solicitor Nielsen thought it necessary to consider the continuing *validity* of the Serbian treaties, and dealt only with the question whether they applied to the former Austro-Hungarian territories which had become united with Serbia in Yugoslavia. Thus, the continuing validity of those treaties seems to have been so well settled as to raise no question.

(3) This is confirmed by the note addressed to the Yugo-

slav Minister on June 4, 1921, by Secretary of State Hughes (Dept. of State File 711.60 h/1; Annex A-4 to the brief below of the United States, *amicus curiae*) [3] in which inquiry was made

> * * * whether it is the view of the Government of the Kingdom of the Serbs, Croats and Slovenes that the treaties and conventions which were in force between the Kingdom of Serbia and the United States at the time of the formation of the Kingdom of the Serbs, Croats and Slovenes are applicable to those parts of the new Kingdom which were not comprised within the territories of the former Kingdom of Serbia.
>
> The inquiry is made in particular with reference to the Convention of Commerce and Navigation, concluded on October 14, 1881; the Consular Convention, concluded on October 14, 1881; and the Extradition Treaty, concluded on October 25, 1901.

On September 29, 1921, the Yugoslav Charge d'Affaires replied (V Hackworth, *Digest of International Law* 374, 375):

> * * * the Government of the Kingdom of the Serbs, Croats and Slovenes considers the treaties and conventions concluded between the Kingdom of Serbia and the United States as applicable to the whole territory of the Kingdom of the Serbs, Croats and Slovenes as constituted at the present.

Here again, the continuation in force of the Serbian treaties appears to have been considered as well settled, the only question being whether the treaties were applicable throughout Yugoslavia.

(4) In September, 1924, the American Minister in Yugoslavia informed the State Department of a proposal of the Yugoslav Government that new commercial, consular and

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[3] Cf. P. 17-18. A copy of the brief below of the United States, *amicus curiae*, has been lodged with the Clerk.

extradition treaties be negotiated. On January 8, 1925, Secretary of State Hughes instructed the American Minister at Belgrade in pertinent part as follows (Dept. of State File 760 h. 00/12; Annex A-5 to the brief below of the United States, *amicus curiae*):

> The Department has received your confidential despatch * * * reporting that the Yugoslav Government is preparing drafts for a commercial treaty, consular and extradition conventions * * * which it intends to submit through the Legation for negotiation with the United States.
>
> * * * * * * *
>
> On September 29, 1921, the Yugoslav Charge d'Affaires ad interim informed the Department that the Government of the Kingdom of the Serbs, Croats and Slovenes considered the treaties and conventions in force between the United States and the former Kingdom of Serbia as applicable to the whole territory of the Kingdom of the Serbs, Croats and Slovenes as at present constituted. In view of this assurance and inasmuch as the extradition convention concluded by the United States and Serbia on October 25, 1901, is, in the opinion of this Government, a modern and comprehensive convention, the Department before considering the negotiation of a new extradition convention would desire to be more fully informed as to what useful purpose would thus be served.
>
> * * * * * * *
>
> This Government will be glad in due course to negotiate with the Yugoslav Government for the conclusion of a treaty to replace the convention of commerce and navigation and the consular convention concluded by the United States and Serbia on October 14, 1881.

(5) In August 1926, the United States initiated steps to negotiate certain treaties with the Yugoslav Govern-

ment "to supersede" earlier instruments on the same subjects. The Yugoslav Government again suggested the negotiation of a new extradition treaty as well. In this connection, Secretary of State Kellogg on March 23, 1927 instructed the American Minister in Belgrade in pertinent part (III *Foreign Relations of the United States, 1927,* 842-843):

> With regard to the negotiation of a new extradition convention you will recall that in instruction No. 543 of January 8, 1925, the Department pointed out that the extradition convention between the United States and Serbia, which is regarded both by this Government and the Government of the Serbs, Croats and Slovenes as being applicable to the whole territory of the Kingdom, is a modern and comprehensive convention. Pending the receipt of the more specific information concerning the proposal of the Government of the Serbs, Croats and Slovenes to supplant this convention * * * the Department is unwilling to consider the negotiation of a new treaty on this subject.

Thus, it appears that the continuation in force and effect of the Extradition Treaty with Serbia was considered well settled, and that, considering it to be modern and comprehensive, both Secretary Hughes and Secretary Kellogg felt that no new treaty on the subject was necessary.

(6) In March 1934, the American Legation in Yugoslavia had inquired of the Yugoslav Government whether it would agree to a *supplemental* extradition treaty with the United States *adding* to the list of extraditable crimes "crimes or offenses against the bankruptcy laws." On May 19, 1934, the Yugoslav Government replied in pertinent part (Dept. of State File 211.60 H/10; Annex B-1 to the brief below of the United States, *amicus curiae*):

> With reference to the American Legation's verbal note * * * relating to a proposal made to conclude a supplemental agreement to the Convention for the

> Extradition of Criminals concluded between the Kingdom of Serbia and the United States on October 12/25, 1901, * * * in the opinion of the Royal Ministry of Justice the extradition of criminals for offenses mentioned in the aforementioned note is already provided for under Article II, No. 7, of the above cited Convention * * *.
>
> * * * * * * *
>
> * * * it will be sufficient in each particular case, that the competent American authorities propound a legalized extract of the legislative provisions indicating that such crimes are also punished under the laws of the United States of America, and the extradition requested will, in such case, be granted according to the Convention for Extradition of Criminals of 1901, which is now in force.

Thus, the United States by its proposal to *supplement* it, and Yugoslavia by its rejection of such proposal as *unnecessary*, again evidenced the continuation in force and effect of the Extradition Treaty here involved.

(7) In an agreement between the United States and Yugoslavia effected by an exchange of notes dated May 4 and October 3, 1946 (61 STAT. [pt. 3] 2451) both the American and Yugoslav notes contain the following language:

> * * * the most-favored-nation provisions of the Treaty for Facilitating and Developing Commercial Relations between the United States and Yugoslavia signed October 2/14, 1881 shall not be understood to require the extension to Yugoslavia of advantages accorded by the United States to the Philippines.

If the Treaty of Commerce of 1881, *supra*, were not in force and effect, there would, of course, have been no need for this reservation. Indeed commercial relations between nationals of the United States and Yugoslavia in the territory of the other are carried on under this treaty. Such

rights as the right of entry, travel, and residence for business purposes, the right to acquire, possess, and dispose of property, the right to exemption from military service (see Item 12, below), the right of access to courts of justice, and numerous other rights have been consistently exercised, and are at this very moment being exercised, by nationals of both countries under and in conformity with the terms of the Treaty of Commerce of 1881. See *Lukich* v. *Department of Labor and Industries,* 176 Wash. 221, 29 P. 2d 388 (1934).

(8) The following statement was made by the Department of State in *United States Treaty Developments* (Dept. of State Pub. 2851, 1947) in Appendix III(C):

> The treaties in force between the United States and Serbia at the time of the formation of the Kingdom of the Serbs, Croats and Slovenes (Dec. 1, 1918) were regarded by the Governments of the United States and the New Kingdom as applicable to the new Kingdom.
> • • •

Previously the Department of State's *Treaties in Force: A List of Treaties and other International Acts of the United States of America in Force December 31, 1932* (Dept. of State Pub. 436, 1933) and the revision thereof as of December 31, 1941 (Dept. of State Pub. 2103, 1944) both listed as in force between the United States and Yugoslavia the Commercial Treaty of 1881, the Consular Convention of 1881 and the Extradition Treaty of 1902.

(9) In the Agreement between the United States and Yugoslavia of July 19, 1948, with respect to the settlement of certain pecuniary claims (62 STAT. [pt. 3] 2658) the following provision is contained as Article 5 thereof:

> The Government of Yugoslavia agrees to accord to nationals of the United States lawfully continuing to hold, or hereafter acquiring assets in Yugoslavia, the

> rights and privileges of using and administering such assets and the income therefrom within the framework of the controls and regulations of the Government of Yugoslavia, on conditions not less favorable than the rights and privileges accorded to nationals of Yugoslavia, or of any other country, in accordance with the Convention of Commerce and Navigation between the United States of America and the Prince of Serbia, signed at Belgrade, October 2-14, 1881.

This Agreement was implemented by the enactment by the Congress of the International Claims Settlement Act of 1949, 64 STAT. 13, which makes specific reference to such Agreement. See S. Rep. 800, 81st Cong., 2d Sess. (1950).

(10) When in accordance with the procedures recommended by the Resolution of October 31, 1947 of the General Assembly of the United Nations (XVII Dept. of State *Bulletin* 1159) the Ambassador of Yugoslavia on March 31, 1951, requested the United States to surrender the petitioner (R. 79, 80), the Department of State on May 14, 1951 replied in pertinent part as follows (R. 80, 81):

> * * * as a result of the circumstances attending Dr. Artukovic's entry into and continued stay in this country proceedings have been instituted in the United States with a view to his deportation. If the deportation of Dr. Artukovic is not effected, the Secretary of State will be pleased to give consideration, after the necessary forms of law have been complied with, to a request from the Ambassador for the extradition of the accused pursuant to the provisions of the Extradition Treaty of October 25, 1901, in force between the United States and Yugoslavia. * * *

In a further reply dated May 21, 1951, the Department of State added (R. 81, 82):

> Finally, the Department of State wishes to point out that except for the possible receipt by it of a formal re-

quest for extradition pursuant to the treaty of October 25, 1901, in force between the United States and Yugoslavia, it is without authority to act in the matter * * *.

(11) On September 26, 1951, Secretary of State Acheson formally certified in connection with this proceeding that all of the provisions of the Extradition Treaty here in issue "continued in force and were applicable to the whole territory of the Kingdom of the Serbs, Croats and Slovenes * * * and are presently in force between the United States and the Federal People's Republic of Yugoslavia." (Ex. DG-E, R. 303-4, 362).

On September 28, 1951, the Yugoslav Ambassador to the United States, also in connection with this proceeding, certified to the same effect (Ex. DG-F, R. 304, 372-373).

(12) Section 1622.42(c) of the Selective Service Regulations, prescribed by the President, September 25, 1951, provides that any alien registrant exempt from military service under the terms of a treaty between the United States and the country of which he is a national shall be placed in Class IV-C, *i.e.*, as exempt. In Local Board Memorandum No. 39, November 6, 1951, the Selective Service System listed "the countries with which the United States has treaties exempting nationals thereof from military service." Yugoslavia is among the countries so listed. As there is no other treaty on the subject, this can only be based on the continuing validity as between the United States and Yugoslavia of the Treaty of Commerce of 1881, *supra*, Article IV of which provides for the exemption from military service in the United States of Serbs, and in Serbia of Americans.

Thus, the decision of the executive branch that the Serbian treaties, including the Extradition Treaty here involved, survived the union with Serbia of Montenegro and

former Austro-Hungarian provinces, is conclusively evidenced by a long line of consistent and unambiguous acts and pronouncements. These constitute the carefully considered and deliberate judgment of those charged under the Constitution with the conduct of the nation's foreign affairs, *Oetjen* v. *Central Leather Company,* 246 U. S. 297, 302 (1918). The question involved is political, properly to be decided by them, *Doe* v. *Braden,* 16 How. 635, 657, (1853); *Clark* v. *Allen,* 331 U. S. 503, 514 (1946), and in such matters their decision is of controlling importance, *Terlinden* v. *Ames,* 184 U. S. 270, 285 (1902).

Conclusion

The issues which petitioner would raise are completely artificial and without foundation in either logic or law. The applicable legal principles are well established and clear. They require no further enunciation or elaboration in relation to this proceeding. They were properly applied by the Court below.

The first question posed by petitioner (P. 19) is synthetic, for if as this Court held in *Terlinden* v. *Ames, supra,* the executive branch has the power to determine whether a treaty is in force notwithstanding political events affecting the other party to it, it necessarily has the power to determine that it has not been terminated as a result of such events. Such determination was made by the executive branch with respect to the Treaty here in issue.

The second question posed by petitioner (P. 19) is irrelevant, for under the principle enunciated by this Court in *Terlinden* v. *Ames, supra,* whether a treaty *has* terminated as the result of political events affecting the other party to it, is a political question to be determined by the executive branch. The executive branch has determined that the Treaty here in issue was not terminated.

WHEREFORE, respondents urge that the petition be denied.

Respectfully submitted,

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